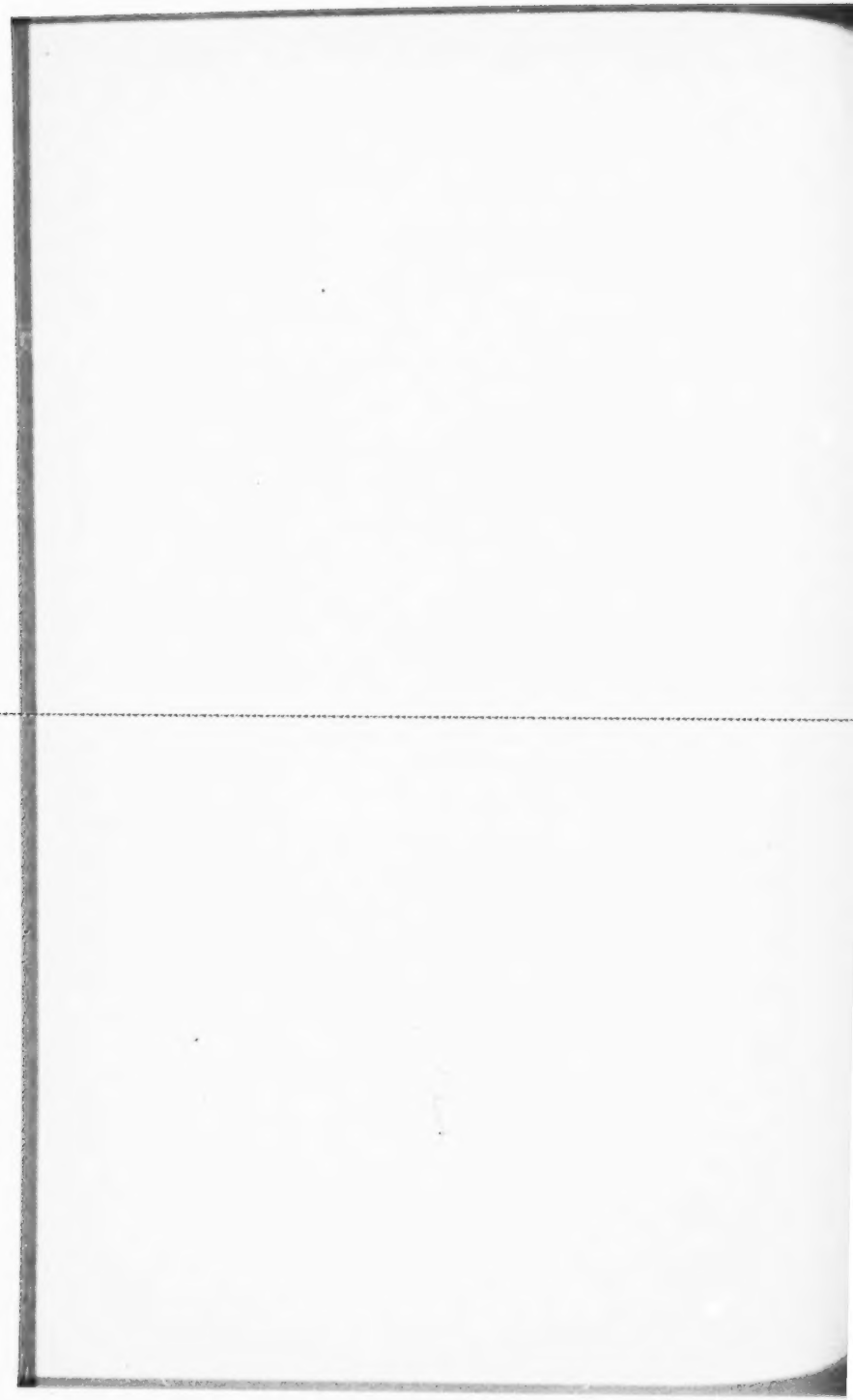

OFFICE SUPREME COURT
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No. 56.

Petition for Rehearing

Term No. 56. Gen. No. 17,407.

Rec'd & Dist'd May 13, 19

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE ROGERS PARK WATER COMPANY, *Plaintiff in Error,* vs. **JOHN B. FERGUS,** *Defendant in Error.*	In Error to Supreme Court of Illinois.

Petition for Rehearing of Plaintiff in Error.

NEWTON A. PARTRIDGE,
ATTORNEY FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE ROGERS PARK WATER COMPANY, *Plaintiff in Error,*	In Error to Supreme Court of Illinois.
vs.	
JOHN B. FERGUS, *Defendant in Error.*	

PETITION FOR REHEARING.

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the plaintiff in error in the above entitled cause, respectfully prays for an order directing a rehearing by the court of said cause on the following grounds:

1. The court seems to have given undue weight and authority to the decision of the Illinois Supreme Court in the case of *Danville Water Co.* v. *City of Danville*, 178 Ill., 229, as announcing a well-settled rule of construction of the statutes of Illinois referred to in the decision herein, when in fact the said case did not announce such construction of any of said statutes. Every decision of said court involving the construction now given to said statutes by said court which was a final decision in the

sense that a writ of error would lie thereon has been brought to this court for review.

2. The court appears to have held that the fixing of rates to be paid for water to be supplied to the inhabitants of a municipality by private water works constructed under a franchise so to do granted by the municipality involves the exercise of governmental functions; although all the provisions for the erection, maintenance and operation of such works, by which the burden of so doing is assumed by the grantee of such franchise, are held to involve contractual relations only; and although such rates are fixed in and by the same ordinance which provides for the construction, maintenance and operation of such works.

3. The decision of the court holds, in effect, that all the burdens and expenses incident to the construction, maintenance and operation of the system of water works of plaintiff in error during, and until the end of, the period of thirty years for which the franchise was granted by the ordinance of 1888 were voluntarily assumed as a matter of contract by the plaintiff in error, so that it is compelled during all of said time to operate said works and supply water to the defendant in error; while the sole consideration to it for said contract and for the burdens thereby assumed is held to be liable to be changed and reduced without the consent of the plaintiff in error upon whom the entire burden of the contract is cast. This has the effect of requiring by peremptory writ of mandamus the specific performance of said contract on the part of the plaintiff in error while it is deprived by the judgment of this court of the consideration which was the sole inducement to it to enter into and assume the contract obligations on its part to be borne.

4. The construction placed by this court on the words "to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not to exceed thirty years" contained in the act of the Illinois legislature concerning cities, villages and towns, of April 10, 1872, does not accord with the usual and ordinary rules of grammatical meaning and construction of words and sentences, because the court holds the word "period" is not so connected with the words "at such rates as may be fixed by ordinance" as to permit the same term or period named to apply to rates so fixed during which such works must be maintained and operated by the grantee under such ordinance; while the ordinary rules of grammar do require such meaning to be given to said words. The word "and" which connects the two clauses of the sentence denotes that equal force is to be given to each member of the sentence, and that the limitation in time, viz.: "not to exceed thirty years," applies equally to the time during which the ordinance may provide the water works shall be maintained and operated and the time during which rates may be fixed by such ordinance if the usual, ordinary meaning of language shall be given to said words. There is nothing to show that said words were used in said act in any other than their usual and ordinary sense and meaning.

5. The act of 1891 is held by the court to give authority to the City of Chicago to pass the ordinance of October, 1897, reducing the rates which the plaintiff in error was authorized to charge to the inhabitants of said city for water supplied to them by plaintiff in error, while if such right existed at all it must have existed under the statutes prior to the passage of said act; and if it

did not so exist, said act of 1891 could confer no authority on said city to pass said ordinance because the water system of the plaintiff in error was erected and put in operation under said ordinance of 1888 and long prior to the passage of said act of 1891.

6. The decision herein seems partially to hold that section 9 of the general incorporation act of April 18, 1872, authorizes the ordinance of 1897 materially reducing the rates which plaintiff in error may lawfully charge for water supplied by it. No such construction had ever been placed on said act previous to the decisions in the water cases herein, and all final decisions of the state court so holding have been removed to this court for review; and such act ought not to apply in this case in any event because the grant was made to a natural person, assignor of the plaintiff in error, and accepted by him.

It is not consistent with the subsequent statutes cited by the court that the legislature intended or knew or supposed that different kinds of contracts could be made with individuals from those authorized to be made with corporations by municipalities. The amendment of 1885 is not compatible with any intention of the legislature to discriminate between individuals and corporations; and the act of 1891 would be meaningless under the construction given it by this court as applied to existing contracts with corporations.

7. The decision herein proceeds on the further assumption that the language of the ordinance of 1888 did not definitely fix the rates which plaintiff in error was thereby authorized to charge and collect for water during the entire period for which it became obliged to maintain and operate said water works. That period is fixed at thirty years by said ordinance; and by assignment from

the grantor, who had accepted its terms, the plaintiff in error, as this court has decided, has assumed the obligation to maintain and operate said water works and thus to supply water to the defendant in error during all the unexpired portion of said period. A peremptory writ of mandamus has been ordered to issue to compel the plaintiff in error to perform this obligation.

The two branches of said ordinance, in which one branch was the sole consideration for the other, should be construed in the same manner, the one being the correlative of the other and the only inducement to the acceptance thereof.

The ordinance was and could be no more than a proposition merely until it was accepted by the grantor. No reason exists why the giving of a monopoly of the supply of water, which was known not to be valid and enforceable except against the village as a rival or competitor, should be necessary to induce the investment of capital and for its security; while at the same time it should not be necessary to induce such investment to fix a rate or consideration which should be unalterable without the consent of the parties during the entire period throughout which those who invested the necessary capital were obliged to maintain and operate the water system and supply water to said village and its inhabitants. This, however, is what this court has decided herein.

Such an interpretation as it seems to us is not consistent with the intention of the parties nor with the import and significance of the language employed by them.

The rule of construction heretofore in force has been that the considerations to be given and received by each

of the parties to an agreement were equally a part of it and were to be construed together so that obligations and benefits should be mutual and equal so far as the binding force of such contract was concerned.

Your petitioner is aware that the matter has already been carefully considered by this honorable court, and that none but weighty considerations can furnish a justification for attempting to reopen a matter which has already consumed so much time and attention.

Principles of so much importance are involved in the decision of the case that we feel not only justified in presenting this petition, but that our duty demands we should do so.

As we understand the decision of the court in the above-entitled cause it must be taken in connection with the decisions rendered at the same time in the *Danville* case and the *Freeport* case, particularly the latter. These decisions seem to have turned upon the construction of the various acts of the Illinois legislature cited in the opinions and also of the particular ordinances under which the several water companies operated their respective water works.

If the establishment of rates to be charged by plaintiff in error does not properly fall within "governmental functions," as the term is used by the court in the decision herein, then the ground for the decision would fail; for it is only on the assumption that the contract for which we contend impairs the exercise of governmental functions by the municipal authorities that the contract is held liable to objection. The authorities in this court holding adversely to the position taken by the court herein seem to us both numerous and weighty.

The court in its opinion in the Freeport case has used the following language:

> "The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company or corporation to supply water, 'be and are hereby empowered to prescribe by ordinance maximum rates and charges for supply of water furnished by such individual, company or corporation.'" * * * "There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is?"

We do not think it has been conceded herein that the power given to cities by that act is a continuing one and capable of repeated exercise. The act is at least capable of the construction that by its language the legislature intended to confer upon the municipality an explicit power to fix the rates to be charged by the grantee of the franchise for water supplied to private consumers, as distinguished from water supplied to the municipality.

No statute prior to 1891 included any specific reference to the supply of water by any other than the municipality to the inhabitants of municipalities; and it might well have been the case that doubts would arise as to the power of municipalities to fix rates for water to be paid by the inhabitants thereof to any other than the municipality itself. Indeed, such power has been disputed. It is only in the act of 1871 that the supply of water to the inhabitants is expressly named and there the reference is in connection with cities which have established municipal water works.

The caption of the act of 1891 for the first time names

the supply of water to the inhabitants of a municipality from other than municipal water works; and this is repeated in the body of the act, where the power is expressly conferred on the corporate authorities of municipalities to prescribe by ordinance maximum rates and charges for the supply of water thus furnished to the municipality and the inhabitants thereof.

This would make the statute rather of the nature of an enabling act, intended to cure a defect in the former statutes. The addition that such rates should be just and reasonable would not necessarily conflict with this construction. There are already enough cases, and these are increasing in number each year, where grants are expiring by limitation to make fully operative the last clause of the section providing for a review by the Circuit Court of unjust and unreasonable rates. In such cases of renewals or extended terms, the necessity of securing judicial review of rates, which, from the nature of the case, might be imposed by one party without the consent of the other, naturally arises and is clearly apparent. No such occasion would or could occur where the rate was fixed by agreement at the beginning of the term. This construction of the statutes had been acquiesced in for nearly twenty years. The words "time to time" seem to us to be consistent with rates fixed by ordinance for definite periods not extending beyond the statutory limit of thirty years. Of course we insist the power to fix rates was given by the acts of 1872.

"Doubt" cannot arise from the decision of the state court, but must arise from the independent judgment of this court.

The first final decision has been brought here. Only three final decisions have been reached, viz: *Rogers Park Water Co.* v. *Fergus*, 178 Ill., 571, decided February 17, 1899; *Danville Water Co.* v. *City of Danville*, 186 Ill., 326, decided June 21, 1900; and *Freeport Water Co.* v. *City of Freeport*, 186 Ill., 197, decided June 21, 1900. These cases have all been brought to this court for review.

The decisions rendered in *City of Danville* v. *Danville Water Co.*, reported in 178 Ill., 299, and *Same* v. *Same*, in 180 Ill., 235, resulted in reversals of judgments rendered in favor of the water company below, and both cases were remanded for further proceedings. Indeed, the Illinois Supreme Court, 186 Ill., 326, say:

> "Manifestly the only purpose of this appeal is to obtain a final judgment in this court to enable appellant to take a further appeal if it should desire to do so."
>
> Advance Sheets U. S. Supreme Court, Oct. Term, 1900, No. 12, 505, 508.

This completely disposes of all decisions as applicable to this case which depend on the doctrine of following rules of property established by a line of decisions, for no such line is here to be found. It is enough to say of the Carlyle case (52 Ill App., 577) that the decision did not involve any discussion of the question of public policy which the court indulged in; that the court is not a court of last resort in cases of this character; and that by the very statute creating the court it is expressly provided that its decisions in any case shall not be of binding authority in any other case. This destroys the weight as an authority of the Carlyle case.

The far-reaching effect of the decision at which this court has arrived can be seen in the movements already in full tide to regulate the rates of gas, electric, street railway, telephone, telegraph and other companies, all of which are assumed to be within the scope of the principles of construction adopted by the court. Numerous statutes and ordinances designed to affect some or all of such companies have already been introduced in the legislature of Illinois and the common councils of Chicago and other cities; and a general crusade for the purpose of reducing rates charged by all public utilities has been inaugurated all along the line. The subject, then, is evidently of the greatest importance, and we feel bound to do everything within our power to have the matter fully considered in all its bearings by this court before the decision finally passes beyond recall.

In submitting this petition we desire to refer to the more extended application made by the Freeport Water Company in the case of *Freeport Water Co.* v. *City of Freeport*, decided March 25, 1901, and we have sought to avoid burdening the court with any presentation of authorities or arguments not deemed by us necessary in order to make clear the exact nature of the grounds presented herein. Should a rehearing be granted by the court we shall endeavor to support these grounds by such authorities and arguments as seem to us to be pertinent.

Your petitioner prays that said cause may be set down for reargument according to the usual course and practice of this honorable court, and that such orders may be

entered herein as to law and justice may appertain and to this honorable court may seem fit and proper.

Respectfully submitted.

NEWTON A. PARTRIDGE,
Attorney and of Counsel for Plaintiff in Error.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded.

Newton A. Partridge
Attorney and of Counsel for Plaintiff in Error.